

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

ALBERTSON'S, INC.

Employer

and

Cases 19-RC-13927
19-UC-662

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 1439, affiliated
with UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION

Petitioner

**DECISION AND ORDER GRANTING UNIT CLARIFICATION PETITION
AND DISMISSING REPRESENTATION PETITION**

Upon petitions duly filed under Section 9(b) and (c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record¹ in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6)(7) of the Act, for the following reasons:

The Employer is engaged in the multi-state operation of a chain of retail grocery stores, including one in Spokane, Washington. The facility involved herein is a gasoline service station, called the Fuel Center, located on the same premises as the Employer's grocery store number 233 at West 1617 Northwest Blvd., Spokane (Store 233, herein). The Fuel Center has been in operation since November

¹ The parties filed briefs, which were considered.

15, 1999. Petitioner seeks accretion of Fuel Center employees to its existing unit (“Unit”) of grocery, produce, bakery sales, delicatessen, and general merchandise employees employed by the Employer in all of its Spokane stores.² In the alternative, Petitioner seeks a self-determination election among the Fuel Center employees as to whether they wish to be represented in the existing unit. The Fuel Center at Store 233 is the only such fuel center currently operated by the Employer in the Spokane area. In addition, the Employer contends that Fuel Center supervisor Lyvia Rudolph is a statutory supervisor.

Unit Issue.

Store 233 has existed at the site for a number of years. The Fuel Center is located in a corner of the store’s parking lot, approximately 200 feet from the store building. Currently, Jerry Howard is the store director, and has over-all authority in the store, including authority to hire, fire, and discipline employees. The second in command is the grocery manager, Jeff Poffenroth. There is also a “third man”, and a “fourth man,” who is the night manager. Howard also has over-all authority over the Fuel Center.

Shortly before the opening of the Fuel Center in November 1999, the positions of Fuel Center supervisor and clerks were posted in Store 233. Then-current employees of Store 233 applied for the positions. With one exception, all employees at the Fuel Center were formerly “Unit” employees of Store 233. The exception was Jeremy Ervin, who was hired from outside. All Fuel Center employees were interviewed by Howard, who made the hiring decisions.

Fuel Center Supervisor Rudolph was previously employed in Store 233 as lobby supervisor. Among the Fuel Center clerks, Mark Pearson was previously employed in Store 233 as a night checker; Donna Reynolds as a courtesy clerk; Lynn (Shirley) White as a lobby clerk; Lori Grittner as a courtesy booth clerk; and Greg Leonard as a helper clerk. All such employees were members of the Unit while they were working in Store 233. The Employer continued to treat them as Unit members until three to six weeks prior to the hearing, when it unilaterally declared them to be excluded from the Unit.³ Fuel Center employees are paid in accordance with Appendix D of the Agreement. At the time of the hearing, they were no longer receiving other benefits in accordance with the Agreement, but were eligible for the benefits which the Employer offers its other, nonunion employees.

Fuel Center employees receive two or three days of specialized training. Such training includes the location of emergency shut-off valves and breakers for the gasoline pumps, and how and when to use them. They also learn how to clean up gasoline spills, and what to do when a customer drives away from the pump without paying, or drives away without first disengaging the hose from the automobile. They also learn to use the scanning device and cash register.

In addition to gasoline, the Fuel Center sells various food items, including chips, cookies, candy, milk, eggs, beer, soda pop, and donuts, as well as some non-food items. Its stock is generally commensurate with that of similar “mini-marts” commonly associated with gasoline service stations operated by Texaco, Arco, and others. The Fuel Center’s merchandise is purchased from outside vendors, in particular Core-Mark. In contrast, the merchandise sold in Store 223 is “purchased” by the store from the Employer’s distribution center in Portland, Oregon. Donuts sold in the Fuel Center are obtained from

² The current collective bargaining agreement “Agreement” has a term of January 1, 1997 through January 1, 2002.

³ Employer witnesses testified that in November 1999, Howard was initially “misinformed” by persons in the Employer’s corporate labor relations department in Boise, Idaho, that the Fuel Center employees would be included in the Unit.

the bakery in Store 233, as are milk and eggs. In addition, Fuel Center employees go to Store 233 two or more times a day to pick up items to sell in the Fuel Center. When they do so, they process a transfer of the items from the relevant Store 233 department to the Fuel Center.

Several times store director Howard has operated the cash register in the Fuel Center for short periods of time, as have other Store 233 managers. On a few occasions, employees in Store 233 have been sent over to the Fuel Center to assist. A store employee named Nicole did this for about 10 minutes about a month prior to the hearing. A store employee named Abby assisted in the Fuel Center three times, for about 15 or 20 minutes each time, during February and March 2000. Center Supervisor Rudolph has called Store 233 for assistance at times when she has been working alone, had several customers, and needed someone to show a customer how to operate a fuel pump or to re-fill the hot dog machine.

Employees from the Fuel Center have been asked to work in Store 233 on occasion. In December, Mark Pearson worked a five-hour shift and an eight-hour shift in general merchandise, and worked in the store on a third occasion as a checker. Greg Leonard worked one night on back wall in Store 233. Lori Grittner worked four days in January in the courtesy booth in Store 233.

There are about six employees in the Fuel Center, and about 65 in the relevant bargaining unit in Store 233.

Store 233 is divided into departments. Employees in the grocery department stock groceries. Helper clerks stock the dairy area and the back wall, which has beer, pop, and chips. Employees in the produce department stock produce, and the salad bar clerk prepares salads. Employees in the front end department are the checkers at the cash registers and also stock candy. Other front end employees are courtesy clerks who bag groceries, bring in carts, and clean. Employees in the bakery department do demonstrations, stock, and bake French bread in the afternoons. Employees in the deli department work behind a counter selling chicken and sliced meat; they cook the chicken and slice meat to order. Employees in the general merchandise department stock non-food items. Employees in the lobby handle video rentals and sell film. There are also customer service booth employees.

In addition, Store 233 has a meat department. There are about nine meat employees who are covered under a separate collective bargaining agreement with Petitioner. There is also a pharmacy wherein two pharmacists and two technicians are employed. The four pharmacy employees are not represented.

The Fuel Center is designated as Department 18 on Store 233's computer, and Howard testified that he treats the Fuel Center as a department of the store. Items for sale in Store 233 are advertised on placards posted atop the gasoline pumps in the Fuel Center. There is an underground pneumatic tube which connects the Fuel Center to Store 233; it is used to transfer money from the Fuel Center to the store, where it is kept in the front end safe. The intercom system is shared by the Fuel Center and the store. Receipts from the Fuel Center go to the bookkeeper in Store 233, who keeps track of Fuel Center sales; every morning the bookkeeper goes to the Fuel Center to take reports off the computer. In the back office of Store 233 are video monitors connected to cameras which are located throughout Store 233 and in the Fuel Center. There are two monitors next to Howard's desk and he can observe the activities in the Fuel Center at any time.

Both Fuel Center employees and Store 233 employees pick up their weekly paychecks from the courtesy booth in the store; both groups of employees use the same time clock⁴ upstairs in the store, and both groups eat lunch in the same breakroom in the store.

Store 233 is open 24 hours a day, seven days a week. The Fuel Center is open from 5:30 a.m. to 11:00 p.m. daily.

In *Safeway Stores, Inc.*, 256 NLRB 918 (1981), the Board reiterated its accretion policy; i.e., the Board will find an accretion only where the additional employees have little or no separate group identity and thus cannot be considered a separate appropriate unit and when the additional employees share an overwhelming community of interest with the bargaining unit. Further, in *Towne Ford Sales*, 270 NLRB 311 (1984), the Board said that common day-to-day supervision and the degree of interchange are the critical factors in making an accretion determination. Common supervision and heavy interchange auger for accretion. Other relevant factors include similarity of skills, duties, and working conditions; functional and administrative integration; and bargaining history.

Herein, the Fuel Center employees have (as found below) Rudolph, a lead person, who reports directly to store director Howard. While she has a narrow range of authority over the other Center employees, she does not possess supervisory authority. Thus, the “day-to-day supervision” factor of *Towne* is rather attenuated and doesn’t present a clear case of separate or common supervision. There have been regular cases of interchange, albeit most of short duration. Thus, the “interchange” factor is present, but not particularly strong.

We must also look at the other typical “Unit” considerations, here more carefully because of the lack of a clear answer by reliance on the foregoing two factors. All of these factors point towards commonality as opposed to separateness. All current Fuel Center employees were formerly employed in the Unit Store 233. Fuel Center employees routinely visit Store 233 to punch the time clock, eat lunch, and pick up their paychecks. Further, the Fuel Center and Store 233 are closely integrated administratively. The money from the Fuel Center is kept in Store 233; the same bookkeeper does the record keeping for both, and the Fuel Center is considered a department of the store and “supervised” by it in the statutory sense. Some Fuel Center supplies come from the store inventory. The Fuel Center employees have a few days of special training related to the sale and handling of gasoline, but otherwise they have the same stocking and cash register skills as Store 233 employees. The Center is located in the store parking lot, close to Store 233. The Employer pays the Fuel Center employees in accordance with provisions in the Agreement, and treated the Fuel Center employees as Unit employees until a few weeks prior to the hearing in this matter.⁵

Based on the entire record, particularly those factors mentioned above, I conclude, that the Fuel Center employees are an accretion to the recognized unit of grocery, produce, bakery sales, delicatessen, and general merchandise employees. I shall, therefore, grant the petition filed in Case 19-UC-662, and clarify the Unit to include the Store 233 Fuel Center employees.

Having so concluded, I shall dismiss the petition filed in Case 19-RC-13927, because there is no QCR.

⁴ The employees are required to punch the time clock four times a day: at the beginning of shift, at the beginning and end of lunch, and at end of shift.

⁵ I place little weight on these factors, since both flow from the original, now erroneous, decision to include the Fuel Center employees in the Unit.

Supervisor Issue.

Rudolph reports directly to store director Howard. Rudolph schedules the Fuel Center employees, but Howard must approve the schedule, and he sometimes changes it. There is no specific evidence in the record with respect to how Rudolph decides which employees will work on which shifts, nor is there any other evidence that Rudolph assigns and directs employees. In testimony, Howard described Rudolph's duties as: "Good customer service. Taking care of the fuel station so we don't run out of product to sell to the customers." Rudolph works from 5:00 a.m. to 2:00 p.m. Apparently a second employee starts at 8:00 a.m.

Rudolph and Howard discussed the conduct of Fuel Center employee Jeremy Ervin,⁶ who had a pattern of tardiness and absenteeism. Howard also talked to employees Person and Reynolds about Ervin's conduct, and in addition spoke to Ervin himself. At some point in the process Rudolph gave Ervin a written memorialization of a verbal warning; Howard was unable to recall whether he had directed Rudolph to give the warning. After satisfying himself that Ervin's conduct was indeed unacceptable, Howard terminated Ervin. He testified that Rudolph had orally recommended Ervin's termination.

Section 2(11) of the Act defines a "supervisor" as:

. . .[A]ny individual having authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Employer contends that Rudolph is a supervisor on the basis that she schedules employees, and recommended discipline which led to the termination of an employee.

The record is insufficient to establish that Rudolph is required to exercise any independent judgment in composing the employees' schedule, and, further, it is clear that Howard changes such schedules at will. The record here does not demonstrate that Rudolph has the type of authority with respect to scheduling found supervisory by the Board in *New Jersey Famous Amos Chocolate Chip Cookie Corporation*, 236 NLRB 1093 (1978), where the individuals found to be supervisors scheduled work assignments and breaks and made sure those schedules were adhered to, "independently, without consultation or direction." Nor does the record establish that Rudolph otherwise responsibly directs employees. Rudolph works a substantial portion of her shift alone, and for the remainder of her shift there is only one other employee present. There is no evidence that she has any regular face-to-face contact with other Fuel Center employees working on other shifts.

Further, the record does not establish that Rudolph effectively recommended the discharge of Ervin, inasmuch as Howard conducted his own investigation of the circumstances. Nor does the record establish that Rudolph independently disciplined Ervin by giving him a write-up, as she clearly discussed the circumstances with Howard first, and the evidence does not establish that she made the decision to give Ervin the write-up. Authority to effectively recommend "generally means that the recommended action is taken with *no* independent investigation by supervisors, not simply that the recommendation is ultimately followed." *ITT Lighting Fixtures*, 265 NLRB 1480 (1982).

⁶ Ervin was the only Fuel Center employee who was not previously employed by the Employer.

I conclude, therefore, that Rudolph is not a supervisor within the meaning of the Act.

ORDER

IT IS HEREBY ORDERED that the petition filed in Case 19-UC-662 be, and it hereby is, granted, to include the Store 233 Fuel Center employees.

IT IS FURTHER ORDERED that the petition filed in Case 19-RC-13927 be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by April 21, 2000.

DATED at Seattle, Washington, this 7th day of April, 2000.

/s/ CATHERINE M. ROTH

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